Best Western City View Motor Inn *and* New York Hotel and Motel Trades Council, AFL–CIO. Case 29–RC–8643

July 27, 1998

DECISION AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board has considered objections to an election held August 2, 1996,[1] and the hearing officer's report recommending disposition of them (pertinent portions of which are attached). The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 16 for and 4 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, and finds that the case should be remanded for further proceedings for the reasons set forth below.

The Employer contends that union agents engaged in objectionable conduct by visiting employees Mahmood Khan Shah (Shah) and Sartaj Khan (Khan) at their homes prior to the election and, inter alia, threatening to ''create trouble'' for them if they did not vote for the Petitioner. In support of this allegation, the Employer presented affidavits by the two employees but was unable to procure their attendance at the hearing.[2]

Upon proof of valid service of a subpoena upon Shah, the Regional Director instituted subpoena enforcement proceedings in the United States District Court for the Eastern District of New York. On November 22, the court issued an Order directing Shah to appear before the Board's hearing officer on December 2 and testify in this proceeding. Although properly served with a copy of the court's Order, Shah did not appear at the hearing on December 2. The Employer's attorney also failed to appear at the hearing. The hearing officer drew an adverse inference against the Employer for its failure to pursue contempt proceedings against Shah in U.S. District Court.

The Employer asserts in its brief that on December 2, it requested that the hearing officer and the Region initiate contempt proceedings against Shah for his failure to comply with the court's Order. However, the Employer's counsel, who, as noted above, did not appear at the hearing on December 2, proffered no evidence that such a request was made and did not request a continuance of the hearing for the purpose of obtaining the absent witnesses' testimony.

Section 102.31(d) of the Board's Rules and Regulations provides that

> Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpoena would be inconsistent with law and with the policies of the Act. Neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

Although these regulations do not expressly set out the procedure for initiating subpoena enforcement contempt proceedings, we find that it will effectuate the policies of the Act to follow the same rule applicable to the Board's institution of subpoena enforcement proceedings. Accordingly, upon the request of the party on whose behalf a subpoena was issued and enforcement proceedings were instituted, the Regional Director must initiate contempt proceedings in U.S. district court upon noncompliance with an enforced subpoena, unless contempt proceedings would be inconsistent with law and the policies of the Act. See Section 102.31(d) of the Board's Rules, supra. However, contempt, like subpoena enforcement, proceedings need not be instituted by the Regional Director absent a request by the party on whose behalf the subpoena was issued; the Regional Director is under no obligation to institute contempt proceedings sua sponte. In any event, a party itself is not obligated to institute contempt proceedings in court. Its only procedural obligation is to request the Regional Director to initiate such proceedings. We therefore do not adopt the hearing officer's finding that the Employer had the burden of instituting contempt proceedings in court against Shah, and we do not adopt the hearing officer's drawing of an adverse inference against the Employer for its failure to institute such proceedings.

As noted above, however, there is no evidence that the Employer asked the Regional Director to institute contempt proceedings in court against Shah.[3] Absent such evidence and applying the above principles, we find no merit in the Employer's contention that the Re-

[1] All dates are in 1996 unless otherwise stated.

[2] The affidavits further aver that the two employees discussed the alleged threats with several other eligible voters. The union agents alleged to have made the threatening remarks denied having made the statements attributed to them by Shah and Khan. Both individuals were no longer employed by the Employer as of the date of the hearing.

[3] A party's unsupported statements in a brief, such as those of the Employer here, do not constitute evidence.

In light of the remand of this proceeding, we find that it is not appropriate at this time to pass on the hearing officer's credibility findings, including whether any adverse inference is warranted based on the Employer's failure to timely request contempt proceedings.

gion erred in failing to institute such contempt proceedings. Accordingly, we adopt the hearing officer's finding that the Region was not obligated to institute contempt proceedings here.[4]

Our dissenting colleague would impose on the Regional Director the burden of instituting contempt proceedings or ''at least inquir[ing] into the matter,'' regardless of whether there is a request that the Board do so. Our colleague asserts that this burden is justified because the Board instituted the underlying enforcement proceeding, and because the Board bears the responsibility of ascertaining the facts in a representation case. We disagree. As noted above, the Board institutes enforcement proceedings upon the request of the party on whose behalf the subpoena was issued. There is no abdication by the Board of its responsibility to determine the facts of a case if it does not institute enforcement proceedings sua sponte, and we perceive no basis for applying a different rule to the decision to institute post-enforcement contempt proceedings.[5] Second, like our colleague we have respect for the court order, running to the Board, enforcing a subpoena but we do not believe that it is disrespectful to the court to decline to delay the completion of a Board proceeding in order to seek to compel, through contempt sanctions, the testimony of a witness that the party which subpoenaed the witness no longer desires or needs. In this regard, we find that it is reasonable and appropriate to require a party to request contempt proceedings if it continues to desire to adduce the testimony. Our colleague's contrary position would result in needless expense to the Board and the parties, and unnecessary delay in the underlying proceeding before the Board, while the Regional Director pursues a witness who may no longer be necessary to that proceeding.[6]

With respect to Khan, on September 4 the Employer, by its process server, left a subpoena with one Asmat Khan, asserted to be Shah's brother, who resided in the building at Khan's last known address. The hearing officer ruled at the hearing on September 6 that proper service had not been made on Khan pursuant to Section 102.113(c) of the Board's Rules and Regulations. That section provides that ''[s]ubpoenas shall be served upon the recipient either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person requested to be served.'' In response to the hearing officer's September 6 ruling, the Employer asserted at the hearing on September 13 that it had mailed a subpoena to Khan on September 6, by certified mail, return receipt requested, but that no return receipt had been received as of September 13. In support of this assertion, the Employer's attorney stated on the record on September 13 that the subpoena had been mailed, and he offered to provide the Region with a written attorney's certification of service. The hearing officer agreed to hold the record open for submission of the certification or the return receipt itself. No subpoena enforcement proceedings were instituted against Khan.

The hearing officer found that the Employer had not submitted proof that it properly served a subpoena on Khan. Although not addressed in the hearing officer's report, the Regional Director may have relied on the Employer's failure to prove valid service as grounds for declining the Employer's request to institute subpoena enforcement proceedings with respect to Khan. The hearing officer drew an adverse inference against the Employer for its failure to produce Khan at the hearing.

The Employer excepts, inter alia, to the hearing officer's findings that it failed to prove service of a subpoena on Khan and to the Regional Director's failure to institute subpoena enforcement proceedings.

We agree with the hearing officer's ruling that service of subpoenas is governed by Section 102.113(c) of the Board's Rules and Regulations, and that the substituted service attempted by the Employer on September 4 was accordingly ineffective. We are, however, unable to determine, on the basis of this record, whether the hearing officer correctly found that the Employer had not provided proof of service of the subpoena allegedly mailed to Khan on September 6.

Section 102.113(e) of the Board's Rules and regulations provides,with respect to proof of service, that

> [I]n the case of service by mail or telegraph, the return post office receipt or telegraph receipt therefor when registered or certified and mailed,

[4] Chairman Gould and Member Brame agree with their colleagues that the Regional Director did not err in failing to institute contempt proceedings based on the Employer's failure to request that such proceedings be instituted, to appear at the hearing on December 2, 1996, or to request a continuance. In these circumstances, they find it unnecessary to pass on their colleagues' findings concerning circumstances, not present in this case, in which institution of contempt proceedings may be required.

[5] Contrary to our colleague, we do not rely on the portion of Sec. 102.31(d) that provides: ''Neither the General Counsel nor the Board shall be deemed to have assumed responsibility for the effective prosecution of the same before the court.'' As stated above, the Board's Rules and Regulations do not expressly address the issue raised in this case. In these circumstances, we deem it appropriate to follow the same principle that the Board applies at earlier stages of ex rel. subpoena proceedings, i.e., the Board will proceed when requested to do so by the party seeking the subpoena unless enforcement proceedings ''would be inconsistent with law and with the policies of the Act.'' Rules & Regs. Sec. 102.31(d).

[6] The likelihood of unnecessary delay and needless expense are even more obvious under our colleague's alternative position that the Board should consider the Employer's exceptions and brief as a timely request for the institution of contempt proceedings, especially in light of the Employer's unexplained failure to make this request at the hearing on December 2, 1996 - or even to attend the hearing.

> or when telegraphed shall be proof of service of the same. *However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service*.'' [Emphasis added.]

The Employer's counsel stated on the record at the September 13 hearing that a subpoena had been mailed to Khan on September 6 by certified mail, return receipt requested, but that no return receipt had been received at that time.[7] The hearing officer ruled at the hearing that the Employer could submit a certification of service and copies of the green return receipt cards once they were received by the Employer prior to the date briefs were due after the conclusion of the hearing, and that those documents would be included in the record as Employer Exhibits 6A and 6B.[8]

The Employer avers that attorney's certifications of service on both Khan and Shah were sent to the Region by letter dated September 20, pursuant to the hearing officer's ruling. But no such certifications appear in the record as Employer exhibits.[9] However, a copy of the certification for the subpoena served on Shah was included in the record as an attachment to Board Exhibit 1, the Application for Order Requiring Obedience to Subpoena filed with the United States District Court in the subpoena enforcement proceedings involving Shah.[10] There is no explanation in the hearing officer's report for the failure to include this certification in the record as an Employer exhibit, or for the absence from the record of a like certification for the Khan subpoena, if such exists.

In these circumstances, the record does not allow us to determine whether the hearing officer correctly found that the Employer failed to prove service on Khan. We shall therefore remand the case to the Regional Director for preparation and service on the parties of a supplemental report concerning the nature and validity of the proof of service submitted by the Employer with respect to the subpoena allegedly served on Khan on September 6 and, in the event that it is determined that proof of valid service was made, for such further proceedings as the Regional Director may find appropriate.[11] Following the service of the supplemental report, the provisions of Section 102.69 of the Board's Rules and Regulations shall apply.

[7] The record includes a copy of the subpoena and the return receipt card that was allegedly mailed with the subpoena.

[8] The last hearing date was December 2.

[9] The Employer refers in its brief to the attorney's certifications as Employer Exhibit 6. However, Employer Exhibit 6 is a copy of the green return receipt card for the subpoena served on Shah, showing that delivery was made on September 11.

[10] The attorney's certification was submitted to the court, along with the green return receipt card, for the purpose of establishing that valid service of the subpoena served on Shah had been made.

[11] We do not pass on the Employer's remaining contentions pending resolution of this issue.

ORDER

IT IS ORDERED this proceeding is remanded to the Regional Director for Region 29 for preparation of a supplemental decision concerning the proof of service of the subpoena allegedly served on Sartaj Khan on September 6, 1996 and for such further proceedings as the Regional Director may deem appropriate.

MEMBER HURTGEN, dissenting in part.

For the reasons set forth below, I conclude that the Board has the responsibility of seeking compliance with a court order enforcing a subpoena, and that it need not wait for a request from the private party on whose behalf the Board sought the court order.

I assume arguendo that the Employer did not request the institution of contempt proceedings. I also recognize that such a request normally precedes a Board lawsuit to seek initial enforcement of a subpoena. However, where, as here, after the court enters an enforcing decree, and the subpoenaed person fails to obey it, the Board need not wait for a private party's request in order to proceed. Rather, it is the Board's responsibility to institute contempt proceedings, or at least to ascertain (from the private party or the subpoenaed person) the circumstances of the failure to obey the court's order. As noted, the Board should do this without waiting for a request from the private party. After all, the Board instituted the enforcement proceeding, and the court's order runs in favor of the Board. And, it is *the Board* that has the statutory responsibility of ascertaining the facts of the representation case.[1] Thus, when the Board's hearing officer observes that the subpoenaed person is not present, i.e., has not complied with the court's decree, the Board, without waiting for a request, should take action.

I do not suggest that the Regional Director has the burden of instituting contempt proceedings in all cases. Rather, as noted above, the Regional Director should at least inquire into the matter. If there are circumstances which make contempt proceedings inappropriate, such proceedings would not be filed. Similarly, if the party who subpoenaed the witness no longer desires or needs the testimony, and the Board itself has no need or desire for the testimony, contempt proceeding would be unnecessary. Phrased differently, there would be no abdication of the Board's responsibilities if it failed to institute contempt proceedings in these circumstances.

Although my colleagues assert that they do not rely upon Section 102.3l(d) of the Board's rules, the fact is that they quote it and seek to extend it to cover post-

[1] The representation hearing is the Board's non-adversarial inquiry into the facts of the case.

decree proceedings. The extension is unwarranted. That Section provides in relevant part: ''Neither the General Counsel nor the Board shall be deemed to have assumed responsibility for the effective prosecution of the same before the court.'' However, it is clear from the language of the Section that ''the same'' refers to the initial action before the court. That is, the Board institutes the suit, and the private party prosecutes that action. The provision is silent with respect to contempt proceedings. As to such proceedings, my colleagues and I agree that the Board is the entity that institutes contempt proceedings. Our disagreement is that, in my view, the Board need not wait for a private party request.

Finally, even assuming arguendo that a private party request is necessary, the Employer's exceptions and brief herein make it clear that it wants compliance with the court's order. Thus, at the very least, the Board should now seek to compel compliance. In that way, Shah's testimony can be secured and used in the remand proceeding.[2]

The result of the of the majority's position is that Shah has disobeyed a Board subpoena and a court order, the Board is left without his testimony, and my colleagues do nothing about it.[3]

[2] The remand proceeding involves Khan. I agree with that remand order. Thus, my position would not involve ''unnecessary delay and needless expense.'' The hearing (concerning Khan) will have to be held pursuant to the remand. I would simply ensure that the testimony of an additional witness (Shah) is heard at that time.

[3] My colleagues note that the Employer did not request contempt proceedings at the December 2 hearing, and did not attend that hearing. The Employer says that it did make such a request on December 2, and that the Regional Director refused to honor the request. In the absence of the witness, the Employer did not attend the hearing. Regional Office personnel deny that a request was made. For purposes of resolving the legal issue of whether a request is necessary, I am willing to assume arguendo that the request was not made. However, absent hearing and a credibility resolution against the Employer, I am unwilling to *fault* the Employer for the events of December 2.

APPENDIX

HEARING OFFICERS REPORT AND RECOMMENDATIONS ON OBJECTIONS

Upon a petition filed on June 21, 1996, in Case 29–RC–8643 by New York Hotel and Motel Trades Council, AFL–CIO (the Petitioner or the Union), and pursuant to a Stipulated Election Agreement executed by the Petitioner and Best Western City View Motor Inn (the Employer), and approved by the Regional Director of Region 29 on July 19, 1996, an election by secret ballot was conducted on August 2, 1996, in the following unit of employees

> All full time and regular part-time front desk employees, housekeeping employees, maintenance employees, night auditors and drivers employed by the Employer at its facility located at 33-17 Greenpoint Avenue, Long Island City, New York, excluding all managers, management trainees, students, interns, secretaries, confidential employees, bookkeepers/accounting employees, sales employees, office clerical employees, casual employees, on-call employees, seasonal employees, temporary employees, guards and supervisors as defined in Section 2(11) of the Act.

The tally of ballots served on the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters	28
Number of void ballots	0
Number of votes cast for Petitioner	16
Number of ballots cast against participating labor organization	4
Number of valid votes counted	20
Number of challenged ballots	7
Number of valid votes counted plus challenged ballots	27

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for the Petitioner.

Thereafter, on Auqust 7, 1996, the Employer filed timely objections to conduct affecting the results of the election alleging, verbatim, as follows:

> (1) During the period immediately preceding the election, the Union visited employees' homes and threatened and coerced the employees of the Employer scheduled to vote in the NLRB's election, threatening that adverse action would be taken against them and severe consequences suffered if they were to vote against the Union.
>
> (2) During this same period of time, the Union continued its widespread campaign of threats and warnings which were pervasive and were in fact communicated to all unit employees, destroying the laboratory conditions necessary for the conducting of a fair election.
>
> (3) By the aforesaid threatens and warnings directed towards voting unit employees and by other similar conduct, the Union destroyed the laboratory conditions necessary for a fair representation election to be held, thereby seriously interfering with the employees freedom of choice.

In light of substantial and material factual issues of credibility on August 15, 1996, the Regional Director for Region 29 issued a report on objections and notice of hearing, ordering that a hearing be held on September 4, 1996,[1] by a duly

[1] Both parties requested and agreed to a postponement of the hearing. An order rescheduling hearing for September 6 and 13, 1996,

Continued

designated hearing officer concerning the issues raised by the Employer's objections. Both parties were represented by counsel at the hearing, and were afforded full opportunity to participate, be heard, present evidence, examine witnesses, and present oral argument.

In accordance with the Regional Director's Order, and upon the entire record of this case, consisting of the transcript and exhibits, including my observation of the demeanor of the witnesses who testified and the specificity of their testimony, I make the following findings of fact and credibility resolutions and issue this report and recommendations to the Board.

The Employer is a New York corporation with its principal office and place of business located at 33–17 Greenpoint Avenue, Long Island City, New York, where it is engaged in the business of providing lodging and related services to the public.

The Objections

In support of its objections, the employer submitted affidavits[2] from Mahmood Khan Shah (Shah), and Sartaj Khan (Khan), maintenance employees of the Employer.[3] The Employer also called Raj Wali Khan (Wali Khan), a driver for the Employer, and Luis Cordero (Cordero), a maintenance employee of the Employer employed at the Employer's facility, to testify.[4] In support of its position the Petitioner called the following five witnesses: James Donovan (Donovan), vice president of the Union; Michael Simo (Simo), business agent and organizer for the Union,; Iqramul Haque and Nisar Qureshi (Haque and Qureshi), union members who are not employees of the Employer; and Jan Kowalski (Kowalski), a maintenance employee employed at the Employer's facility.

Pursuant to an order rescheduling hearing issued by the Regional Director on August 22, 1996, the hearing in the instant case was scheduled to commence on September 6, 1996, to resume on September 13, 1996, and continue on consecutive days thereafter. On September 6, 1996, the Employer appeared by its counsel. When called upon by the hearing officer to present its first witness, the Employer stated that it had been unsuccessful in its efforts to compel the presence of its witnesses Shah and Khan, to support their own affidavits at the hearing. (Tr. 5, 6.)[5] The Employer further stated that it had attempted to secure the presence of these two witnesses by serving subpoenas ad testificandum upon them. However, as of the first day of the hearing, the Employer was unable to provide sufficient proof that it had effectuated proper service upon its two witnesses. (Tr. 8–11.)

The Employer contended that the absence of his witnesses, Shah and Khan, at the hearing came within the definition of ''unavailability'' under Federal Rule of Evidence 804(a)(5).[6] Counsel for the Employer further stated that on September 5, 1996, he had advised the Petitioner's counsel of the names and addresses of the two witnesses, as to what they would be testifying, what was contained in their affidavits, and as to the difficulty the Employer was having in securing the presence of Shah and Khan at the hearing thus meeting the requirements under Federal Rule of Evidence 804(b)(5).[7] The Employer's counsel asked that the affidavits of Shah and Khan be received into evidence. Based upon the aforementioned, the hearing officer accepted the affidavits of Shah and Khan as Employer's exhibits 1 and 2 respectively.

During the interim period between the hearing dates,[8] on September 11, 1996, the Employer was able to effectuate service of a subpoena ad tesificandum upon Shah, which requested his presence at the hearing in the instant case on September 13, 1996. The hearing resumed on September 13, 1996, however, neither of the Employer's witnesses Shah nor Khan were present to provide testimony. The Employer requested Region 29 to institute subpoena enforcement proceedings in the United States District Court for the Eastern District of New York (U.S. District Court). Upon the Employer providing the Region with the proof of service of its subpoena upon Shah, on November 15, 1996, the Regional Attorney for Region 29 applied to the U.S. District Court for an order requiring Shah to obey the above-mentioned subpoena ad testificandum.[9] Subsequently, on November 19, 1996, the Employer by its process server, Gillman Process Service, Inc., served an order to show cause issued by the U.S. District Court ordering Mahmood Khan Shah to appear in U.S. District Court on November 22, 1996. On November 22, 1996, the subpoena enforcement proceedings resumed as scheduled, before the Honorable Judge Gershon in U.S. District Court. Shah failed to appear at these proceedings. On

and consecutive days thereafter was served by the Region on August 22, 1996, in an attempt to accommodate the schedules of counsel.

[2] The affidavits of Mahmood Khan Shah and Sartaj Khan were taken by Employer's counsel and sworn and subscribed to before an associate in his office. The Employer initially provided these affidavits to the Region as its offer of proof in support of the objections herein.

[3] At the hearing the Employer did not present Mahmood Khan Shah nor Sartaj Khan to provide testimony in support of their affidavits.

[4] Raj Wali Khan was present at the hearing pursuant to a subpoena ad testificandum served upon him by the Petitioner.

[5] Employer's counsel stated on the record that he had spoken to Mohammed Khan, manager of the Employer's facility, who advised him of a conversation which took place between himself and employee Mahmood Khan Shah on August 31, 1996, regarding his attendance at the representation hearing. Mohammed Khan told Employer's counsel that he had advised Shah of the date and time of the hearing and that Shah had indicated to him that even if he got a subpoena he would not attend the hearing.

[6] FRE 804(a)(5) provides that a declarant is unavailable if he/she is absent from the hearing and the proponent of his statement has been unable to procure his/her attendance by process or other reasonable means.

[7] FRE 804(b)(5) provides an exception to the hearsay rule in situations where the declarant is unavailable as a witness. Pursuant to this rule a statement which has sufficient circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[8] The hearing was to resume on September 13, and consecutive days thereafter.

[9] Docketed in United States District Court for the Eastern District of New York as MISC. 96–140, Honorable Judge J. Gershon.

November 22, 1996, Honorable Judge Gershon signed an Order requiring obedience to subpoena ad testificandum, directing Shah to appear before a hearing officer of the National Labor Relations Board in the instant matter at a hearing room located at Region 29 on December 2, 1996, and at such other times as the hearing officer may designate, to answer any and all questions relevant and material to the matters being litigated in this proceeding before the Board. The Employer claims that on September 29, 1996, Gillman Process Service, Inc., delivered a copy of the aforementioned order requiring obedience to subpoena ad testificandum to Jane Shah, a woman who claimed to be Shah's wife, at Shah's last known address.[10] On December 2, 1996, the hearing resumed. Shah did not appear to give testimony in the instant matter. No representative of the Employer was present at the hearing on December 2, 1996, to establish that it had even served the court order upon Shah. Notwithstanding the efforts made by the Region on behalf of the Employer to compel Shah's presence at the hearing, the Employer failed thereafter to initiate further proceedings before the U.S. District Court[11] against Shah to compel Shah's obedience with the court's order.[12]

Despite my inability to observe the demeanor of the Employer's witnesses, I will nonetheless consider the affidavits of Shah and Khan for their substantive content. With respect to the substance of the Employer's objections Sartaj Khan, a maintenance employee, states in his affidavit that on the 3 nights preceding the August 2 election, Tuesday, Wednesday, and Thursday, between 8 and 9 p.m., he was visited by three men who identified themselves as being with the Union. Khan states that Donovan, one of these three men, gave him his card, and described the two other men as a short American White male, and a Pakistani male. Khan states that the same three men returned each of the 3 nights and that as Donovan spoke in English, the Pakistani male translated Donovan's comments into Pakistani.[13] Khan states that Donovan said if he voted for the Union he would get wage increases of $14 to $15 per hour and a lot of benefits. Khan also states that Donovan said to him ''if I didn't vote for the Union, they were going to create a lot of trouble for me'' and that they also said, ''it would be hard for me if I didn't vote for the Union and I would be sorry.'' Khan states that he took the foregoing to be a threat, and that he had no idea why they kept going back to his apartment on each of the 3 nights. Khan states that he did not reply to them at all on any of the nights, but that he was very upset because they threatened him all 3 nights and they were interfering with his personal life. Khan also states that after the Union's first visit to his home, he returned to work on Wednesday, the next day, at the Employer's facility. Sartaj thinks that sometime on Wednesday morning, while he was having tea with four of his coworkers, Raj Wali Khan, Nassar Ahmed, Jan Kowalski, and Luis Cordero, he spoke to them in English about the visits from the Union. Khan states that he told the other employees that the Union threatened him and that there would be trouble if he didn't vote for the Union. He also told them that he was afraid because he was threatened with ''trouble.'' Khan states that during this conversation, two of the employees present, Wali Khan and Nassar Ahmed (Ahmed), told him that they too were also visited in their homes. Khan recalls Wali Khan saying that he also was threatened with trouble if he didn't vote for the Union. Khan also states that on Thursday morning he spoke to one of the desk clerks, Faisal Gul (Gul), and told him that he had been visited twice by the Union and that they had threatened him with trouble and that he was afraid.

Mahmood Khan Shah, in his affidavit, states that either on Tuesday or Wednesday night before the election, sometime between 8 and 9 00 p.m. he was visited by three men who identified themselves as being with the Union. The first man gave him his card with the name Jim Donovan on it. He described the other two as a Pakistani male and a White American male who was fairly short. Shah states that Donovan spoke in English and that the Pakistani union man translated for him, although Shah understood what Donovan said in English. Shah states that Donovan said to him that if he voted for the Union he would end up with one good job and that he wouldn't need to work more than one job. Shah also states that Donovan then said to him that there would be ''trouble'' if he didn't vote for the Union and to vote ''Yes.'' Shah states that after Donovan said this to him he was very scared and that the Union went to his apartment without any prior notice or telephone call and he has a wife and two small children. The following morning, Shah believes it was Thursday, he spoke to Wali Khan, one of his coworkers at the Employer's facility, in Pakistani. Shah states that he repeated to Wali Khan what had occurred to him the evening before and the fact that he was told there was going to be trouble for him if he didn't vote for the Union.

The Employee called its employee, Wali Khan, who testified[14] that before the election, Union Representatives Donovan, Simo, Haque, and Qureshi visited him once at his home. Wali Khan could not specify on what day of the week he was visited by the Union but recalls it was ''around one week before the election.'' (Tr. 22.) Wali Khan testified that these four persons went to his house from ''7:00 p.m., 7:30 to 8:00 p.m.'' (Tr. 22.) Although Wali Khan could not identify the union representatives who visited his home by name,

[10] In his affidavit Shah states that he resides at 170–25 Highland Avenue, Jamaica, New York 11432.

[11] It is the Employer's burden to prosecute its witness Shah. for Shah's failure to comply with the subpoena ad testificandum. See *Hydro Conduit Corp. v. NLRB*, 274 NLRB 1293 (1985), and NLRB Rules and Regulations Sec. 102.31(d) which states in part ''Upon a failure of any person to comply with a subpoena issued upon the request of a private party, the general counsel shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof. Neither the General Counsel nor Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.''

[12] The Employer's counsel was not present at the last day of the hearing, December 2, 1996, to establish that it had even served the U.S. District Court's Order upon Shah.

[13] Khan states that he also understood Donovan as he spoke in English.

[14] Raj Wali Kahn, present at the hearing under subpoena by the Petitioner, was called to the stand by the Employer's counsel. On several occasions the Employer's counsel posed leading questions on direct examination and the hearing officer had to remind Employer's counsel that he had called Wali Khan to the stand for direct, not cross-examination. (Tr. 24–25.) Wali Khan is not a native English speaker, although he spoke English well enough to testify without an interpreter.

they were all present in the hearing room while Wali Khan testified and he was able to identify these four by pointing to them in the hearing room (Tr. 22). The Employer and the Respondent agreed to identify the four union individuals by name with the assistance of Petitioner's counsel. The record reflects that the four men Wali Khan pointed to in the hearing room were Donovan, Simo, Haque, and Qureshi. (Tr. 23.) Wali Khan testified that during the visit Donovan talked to him about the Union and its benefits. Wali Khan testified that Donovan gave him a paper and asked him to fill it out. Wali Khan testified that he didn't fill out the form right then and there. When asked if Donovan was angry about this Wali Khan replied ''No.'' (Tr. 25.) According to Wali Khan, ''I had no problem. I was not scared. I was there at voting time and I didn't feel any pressure from any side.'' (Tr. 25.) Wali Khan estified that ''nobody tell me that they were visited at their home. What people was [sic] telling me is they (the Union) went to somebody else's house but they didn't find them in the house.'' (Tr. 25.) Khan could not identify these people by name but referred to them as the ''other people''(Tr. 25).[15] On cross-examination Wali Khan testified that he never had a conversation with Mahmood Khan Shah concerning a visit by the Union to his home. (Tr. 28.)

Cordero, a maintenance employee, was also called by the Employer and testified that two employees told him, right before the election, that they were visited at home by people from the Union. Cordero testified that he heard Shah and Khan speaking in their own language and that he asked them to speak in English, which they did. Shah and Khan told Cordero they were visited by representatives of the Union at home. They told Cordero they were afraid because they were ''being pushed.'' (Tr. 98.) Cordero testified that Shah told him ''I don't know what's happening but they put me in a bad mood.'' (Tr. 99.) Cordero also testified during cross-examination that Shah and Khan said to him ''the Union was pressuring them to vote and they were afraid. I don't know why.'' (Tr. 100.) Cordero testified that the exact words they used in English were ''I have anger.'' ''It's the Union'' and ''Put the vote. The vote is important.'' (Tr. 102.) During this conversation a man named John went in and out of the room but John did not engage in conversation with Shah, Khan, or Cordero. Cordero also testified that the Union had left him a document at his former residence and that he told Shah and Khan about this.

The Union called its vice president, Donovan, who testified that on Monday and Tuesday nights, the evenings of July 29 and July 30, 1996, he, along with Simo, Qureshi, and Haque, visited, or attempted to visit, certain employees at home. The Union had identified employees who had not attended any union meetings as those they wanted to pay home visits to. The Union sent out two teams to visit the employees. One team was designated to visit the Pakistani employees. Donovan testified that the other employees who were not Pakistani were going to be visited by another team of organizers, however they went out and were not able to see anybody either because they weren't home or because the Union had the wrong addresses for them. (Tr. 41.) Donovan testified that Qureshi and Haque were asked by the Union to go along on these home visits because Qureshi speaks fluent Urdu and Haque speaks a little Urdu.[16] Donovan states that the Union tried to map out the visits and visited or attempted to visit employees in a certain order.

On July 29, 1996, the union representatives first went to the home of Wali Khan, located in Queens Village, New York, whom they were able to locate and speak to. Then the union team went to visit the employees in the Jamaica, New York area. Donovan testified that they had addresses for three employees on Highland Avenue: Chamni Khan at ''164—something Highland Avenue'' (Tr. 41); and Sartaj Khan and Mahmood Khan Shah who both lived in the same apartment building located at 170–25 Highland Avenue. However, Donovan testified that on July 29, 1996, the union team was unable to locate or speak to Chamni Khan because he had moved to a new address,[17] nor were they able to locate or speak to Shah or Khan because they were not at home. (Tr. 31, 32.)

Donovan testified that on July 29, 1996, the union team representatives spoke with employee Wali Khan for about 1-1/2 hour on the stoop in front of Wali Khan's home at about 8 p.m. (Tr. 37, 39.) Donovan testified that he spoke to Wali Khan about the Union and its benefits, specifically discussing salary, pension benefits, and insurance. Donovan also told Wali Khan that ''he thought the Union was going to win the election but that they still wanted to talk to everybody so that everybody had the opportunity to hear about the Union.'' (Tr. 38.) Donovan also told Wali Kahn that the election was going to be by secret ballot and about the possibility that the employees might have to go on strike to get a good contract. Before leaving Donovan gave Wali Khan some union leaflets and a card for him to sign. Donovan testified that he told Wali Khan that he didn't have to make up his mind at that time and that he could fill out the card and return it to Ali Tahir, another driver at work. (Tr. 40.) When questioned whether he had ''at any time during these meetings threaten Raj Wali Kahn in any way,'' Donovan replied, ''Absolutely not.'' (Tr. 40.)

Donovan testified that the Union was unsuccessful in speaking to either Khan or Shah, on July 29, 1996. However, while attempting to locate Khan at his apartment the union representatives did encounter Asmat Khan, who told them that he was Khan's brother as well as Shah's brother-in-law.[18]

[15] The Employer's attorney asked Wali Khan the same question again ''Did any of the people mention that they did come to the house?'' and Wali Khan replied, ''No.'' The hearing officer pointed out to Employer's counsel that the same question had just been asked and answered. (Tr. 26.)

[16] The team headed by Donovan attempted to visit certain Pakistani employees who had not attended any union meetings. Donovan testified that the Union recruited Haque and Qureshi, employees at Tavern on the Green, to accompany the Union on these visits, because they were individuals who could talk about their experiences as union members and had both been involved in a prior organizing drive. Moreover Haque and Qureshi were Pakistani and spoke Urdu (one of the languages spoken in Pakistan).

[17] Chamni Khan's neighbors provided the union team with his new address on Jamaica Avenue.

[18] There is much record testimony regarding the contents of the conversation between Donovan and Asmat Khan. I will not discuss the contents of this conversation inasmuch as it took place between a union agent and a third party who was not eligible to vote in the election. Thus, this testimony has little or no relevance here. Moreover, I credit Donovan' testimony that it was ''a very friendly visit'' and that at no time were there any threats made by the Union nor

On July 30, 1996, Donovan, Simo, Qureshi, and Haque were unsuccessful in their attempts to visit Chamni Khan, Faisal Gul, and Sartaj Khan. However, Donovan testified that after they knocked on Asmat Khan's door that he told them ''Sartaj (Khan) wasn't home but Mahmood (Khan Shah) was home and brought us downstairs.'' (Tr. 35.) The conversation with Shah took place in the hallway on the third floor of the building. Donovan testified that it looked like they had woken Shah up, and characterized their conversation as a ''friendly conversation but it was pretty short'' (Tr. 35), about 10–15 minutes. (Tr. 36.) Donovan testified that they told Shah they didn't want to disturb him, that they knew he worked three jobs. The union representatives told Shah about why they were there to visit him and what the Union was about. The union representatives told Shah that their members had better benefits and got paid better than the Employer's employees. Donovan also told Shah about the pension plan and asked Shah if he had a pension. Donovan testified that they told Shah that the election would be by secret ballot and that nobody would know which way he voted. (Tr. 36.) Donovan described Shah as not very talkative, sleepy, but very friendly. Donovan also testified that as they were leaving either he or Simo said to Shah, ''we know how hard you are working with three jobs, maybe if we win this election, you will only have to work one job.'' (Tr. 36.) Donovan left some union literature with Shah.

During cross-examination the Employer asked Donovan if it seemed unusual to send a team of four or five union people to speak to an individual employee. Donovan testified that ''this was not unusual not only for their Union but for alot, most Unions that organize.'' (Tr. 44.) The Employer also asked Donovan if it wasn't ''somewhat intimidating to have to face four or five people'' and suggested to Donovan ''wouldn't it have been better to go with just one or two people'' (Tr. 45), to which Donovan replied ''No . . . as Union organizer. I can tell you from experience that it's not better.'' (Tr. 45.)

Haque, a union member is employed at Tavern on the Green, and has never been employed by the Employer. The Petitioner called Haque who testified that he accompanied Donovan, Simo, and Qureshi on the home visits on July 29 and 30, 1996. Haque corroborates Donovan's testimony and reiterated that the conversations were ''friendly, very friendly.'' (Tr. 52.) Haque testified that the only two employees they spoke to were Wali Khan and Shah. He also testified that the only visits he recalls the union representatives making were on July 29 and August 1, 1996 and that he did not participate in any other visits on July 31 or August 1, 1996. (Tr. 57.) Haque also testified that he never met Sartaj Khan.

Qureshi, who is also a union member and an employee at Tavern on the Green testified on behalf of the Petitioner. Qureshi corroborated the testimony of Donovan and Haque. Qureshi further testified that Wali Khan reacted ''very friendly (to him), from my country, were are all friendly'' and that Wali Khan did not seem intimidated by Donovan or Simo.'' (Tr. 62.) During the Union's visit to Shah, Shah also acted ''very friendly'' toward Qureshi and Donovan. (Tr. 64.) When questioned whether anyone seemed frightened by the house visits, Qureshi replied ''No.'' (Tr. 65, 66.) Simo, a business agent and organizer for the Union corroborates the testimony of Donovan, Haque, and Qureshi.

was there any mention that ''there could be trouble for his brother if he didn't vote for the Union.'' (Tr. 34.)

Discussion

Affidavits received into evidence, under FRE 804(b)(5) are subject to further consideration, particularly as to the question of ''equivalent circumstantial guarantees of trustworthiness'' as to these affidavits. The Board has consistently viewed that this requirement of FRE Section 804(b)(5) has been met by an affidavit taken by a Board agent. *Colonna's Shipyard*, 293 NLRB 136 (1989), *Auto Workers Local 259 (Atherton Cadillac)*, 225 NLRB 421 (1976). Similarly, affidavits taken by a charging party who is clearly not a neutral person may also be received into evidence if taken under ''equivalent circumstantial guarantees of trustworthiness.'' *Weco Cleaning Specialists v. NLRB*, 310 NLRB 308 (1992); *Doral Building Services*, 266 NLRB 1215, 1217 (1983). The Board generally receives such documents in evidence, while cautioning that such evidence ''must be evaluated with maximum caution, only to be relied upon if and when consistent with extraneous, objective, and unquestionable facts.'' *Industrial Waste Service*, 268 NLRB 1180 (1984); *United Sanitation Service*, 262 NLRB 1369, 1374 (1982); *Custom Coated Products*, 245 NLRB 33, 35 (1979); *Colonna's Shipyard*, supra.

In regard to the taking of the affidavits of Shah and Khan, in discussions with Employer's counsel, prior to the commencement of the hearing and during the hearing, I found him to be believable and candid. I am convinced that Employer's counsel who as a former Board agent had extensive previous experience in taking affidavits utilized the same or similar procedures in taking the affidavits as he did when he was a Board agent. Thus, I reaffirm my decision at the hearing to receive the affidavits of Shah and Khan into evidence. As to the weight that should be given the statements appearing in Shah's and Khan's affidavits, I rely on the facts contained therein to the extent that they are consistent and corroborated by the testimony of the other witnesses who testified at the hearing.

When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.[19] Initially, I draw an adverse inference against the Employer for its failure to pursue contempt proceedings in U.S. District Court against its witness, Shah, in order to compel Shah's presence at the hearing.[20] I also draw an adverse inference against the Employer for its failure to produce its witness, Khan. Although Khan provided an affidavit to the Employer, the Employer did not provide proof that it had properly served a subpoena ad testificandum upon Khan, nor did the Employer present Khan to testify at the hearing. In particular, it may be inferred that the witness if called, would have testified ad-

[19] 2 Wigmore, *Evidence*, Sec. 286 (2d ed. 1940); McCormick, *Evidence*, Sec. 272 (3d ed. 1984); *International Automated Machines*, 285 NLRB 1122, 1123 (1987); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977).

[20] Although the Employer did make efforts to secure the presence of its witness at the hearing it did not pursue contempt proceedings.

versely to the party on that issue.[21] Since the Employer did not produce Khan or Shah, I was unable to observe and consider their demeanor during their testimony, or the manner in which they testified. I have, nevertheless, considered their affidavits. In this regard, Khan stated that during the union representatives' visit, the Union told him ''if I didn't vote for the Union, they were going to create a lot of trouble for me'' and that ''it was going to be very hard for me if I didn't vote for the Union and I would be sorry.'' Shah stated in his affidavit that during a home visit, Donovan said, ''there would be trouble for me if I didn't vote for the Union.'' The Union denied making these statements, and presented four witnesses, Donovan, Simo, Haque, and Qureshi whose testimony I credit on this point. In this regard, Donovan was forthright, and did not deny attempting to locate these employees at their homes just prior to election. Donovan also provided a detailed account of his attempts to locate and speak to these and other employees on the evenings of July 29 and 30, 1996, about the upcoming election. I would credit Qureshi and Haque, who both testified in a calm, direct manner and appeared to be, in my view, honest. I also credit the testimony of Simo, who also testified in a candid manner, even admitting that he was bad with names. Furthermore, all four of the Petitioner's witnesses credibly and consistently testified that they never met or spoke to Khan, although they openly admitted that they attempted to locate him at home on July 29 and 30, 1996. Furthermore Donovan, Qureshi and Haque forthrightly admitted speaking to Shah on July 30, 1996, and provided credible and consistent details of this conversation. Moreover, I credit the testimony the Employer's witness Wali Khan who appeared relaxed as he testified, even as he described in detail the contents and the tenure of the conversation that he had with Donovan and the other union representatives on the evening of July 29, 1996.

Union agents engage in objectionable conduct when the conduct in question reasonably tends to interfere with the employees' free and uncoerced choice in the election.[22] The inquiry comprises the following factors: the number of incidents of misconduct, the severity of the incidents and the likelihood that they would cause fear among the unit employees; the number of unit employees subjected to the misconduct; the proximity of the misconduct to the election date; the degree or persistence of the misconduct in the minds of the unit employees; the extent of dissemination of the misconduct among the unit employee; the effect, if any, of the misconduct by the opposing party in canceling out the effects of the misconduct; the closeness of the final vote; and the degree to which the misconduct can be attributed to the Union.[23]

Initially, I note that the union representative's alleged remarks, even if made, did not reasonably interfere with Shah's and Khan's free uncoerced choice in the election. With respect to the timing of the visits neither Shah nor Khan, in their affidavits provided a specific date on which the union representatives visited them, and in these circumstances I credit Donovan testimony that he never actually met Khan, and that he did in fact meet and speak to Shah, on only one occasion, July 30, 1996. I also credit the testimony of Donovan, Simo, Qureshi, and Haque regarding the tenure of the conversations which they described as ''friendly.''

With respect to the claimed dissemination to the unit employees of the Union's alleged objectionable comments, Wali Khan testified that he discussed the upcoming election with some of the maids at the Employer's facility who all told him the Union was going to win. I credit Wali Khan's testimony that he never spoke to Shah regarding any visits made to his home by the Union, nor that he ever heard any mention of ''trouble'' discussed by any other employees prior to the election. I also credit Kowalski's testimony that although he spoke with another employee, whom he called Wally, about the Union's home visits, he was never told by Wally that there could be trouble if the employee voted against the Union[24] I also credit Cordero's testimony that he spoke with Khan and Shah several days before the election about the Union. With respect to Cordero's communications with Shah regarding the Union's visit to Shah's home, Cordero testified that Shah stated that: the Union ''put him in a bad mood''; and that ''he had anger,'' that the Union told him to put the vote, the vote is important''; and that the ''Union was pressuring them to vote, that they were afraid, but I don't know why.'' Having credited the testimony of all of the witnesses who testified at the hearing on behalf of both the Employer and the Petitioner, I am unconvinced that the Petitioner's agents made any statements attributed to them by Shah or Khan concerning ''trouble'' or ''problems'' Shah and Khan might have if they did not vote for the Union. Nor am I persuaded that Shah or Khan disseminated to other employees that such alleged threats were made to them.

As previously stated the Employer's witnesses, Khan and Shah were not available to testify at the hearing. Having credited the testimony of the witnesses who testified, I find that the Union's representatives did not engage in objectionable conduct during the home visits. Moreover, there is no credible evidence of widespread dissemination of the alleged threats, and the only testimony on this point is about Shah being in a ''bad mood'' and having ''anger'' about the election. The only evidence that any employee was fearful was Cordero's hearsay testimony that the Union was pressuring Shah and Khan to vote and that they were ''afraid but that he didn't know why.'' Even assuming that I find the Petitioner was responsible for so upsetting Shah and Khan so as to coerce them into voting for the Union, in the absence of evidence of dissemination of the alleged msconduct to the other unit employees, their votes would not have affected the election results. The Petitioner won the election by a wide margin and the votes of Shah and Khan were two out a total of seven challenges that were not determinative of the election's outcome. Thus, I reject the Employer's allegations that

[21] The Employer's offer of proof in support of its objections were the affdavits of the two ''missing witnesses.'' The Employer contends that it has attempted to secure the presence of Shah and Khan to no avail.

[22] *Baja's Place*, 268 NLRB 868 (1984).

[23] *Avis Rent-A-Car Svstem*, 280 NLRB 580, 581 (1986).

[24] The Employer's attorney alleged that Kowalski had reason to color his testimony because there was a disciplinary matter pending against him at the Employer's facility and that the Union had promised they would help him in this regard. I credit Kowalski's testimony that he had discussed the aforementioned incident with the Union but that he was unaware of anything the Union was doing on his behalf regarding this matter and that he was not promised anything by the Union in return for his testimony at the instant hearing.

the Petitioner was responsible for destroying the laboratory conditions necessary for the holding of a fair election.

SUMMARY AND RECOMMENDATIONS

Based upon the findings of fact, credibility resolution and discussion of the applicable legal principles, it is recommended that the Employer's objections be overruled in their entirety. As the tally of ballots shows that the majority of valid votes counted have been cast for the Petitioner, it is recommended that the Board issue a Certification of Representative to the Petitioner.

RIGHT TO FILE EXCEPTIONS

Under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party, within 14 days from the issuance of this report, may file with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570–0001, an original and eight copies of exceptions to such Report with supporting brief if desired. A copy of such exceptions together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Board. Within 7 days from the last date on which exceptions may filed, a party opposing the exceptions may file an original and eight copies of an answering brief with the Board. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Board. If no exceptions are filed to such Report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other dispositions of the case. Exceptions must be received by the Board in Washington, D.C., by February 20, 1997.